(3)

No. 88-70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN DEKLEWA, THEODORE DEKLEWA and ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, ETC., LOCAL 3, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR THE RESPONDENT UNION

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BRIEF IN OPPOSITION FOR THE RESPONDENT UNION [1]

The citations to the opinions below, the basis of this Court's jurisdiction and the pertinent statutory provisions are set at pp. 1-2 of the *certiorari* petition (hereinafter "Pet.") in this case and are therefore not repeated here.

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[1] Contemporaneously with the filing of this brief in opposition, the Union is filing a conditional cross-petition for a writ of *certiorari* challenging a portion of the decision below not challenged by the Employer in its *certiorari* petition herein.

STATEMENT OF THE CASE

The Employer's *certiorari* petition notes that the "relevant facts were stipulated" (Pet. 2) and then purports to "briefly state[] that stipulation "[s]tripped of formalisms," (*id.*). That restatement, however, does not accurately track the stipulation and, for the Court's convenience, we therefore state the facts by reprinting the National Labor Relations Board's summary of the stipulation in its decision herein (omitting only the facts relevant to establishing the Board's jurisdiction and a discussion of a grievance filed under the collective bargaining agreement here that is no longer relevant:

> . . . John Deklewa & Sons, Inc., a Pennsylvania corporation, has an office in Bridgeville, Pennsylvania, where it is engaged in the business of heavy construction. . . . John Deklewa & Sons, a partnership with an office at the same location as the . . . Corporation, is engaged in the construction of commercial and industrial buildings. . . .
>
> * * * *
>
> The Iron Workers Employer Association of Western Pennsylvania, Inc. (the Association) is an organization composed of approximately 35 construction industry employers. The Association represents its employer-members in negotiating and administering collective bargaining agreements with the [International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO]. The Association and the Union have been parties to successive collective bargaining agreements for at least the past 30 years, the most recent relevant contract having been effective 1 June 1982 through 31 May 1985.
>
> On 24 June 1960 the [Employer] entered into a prehire agreement with the Union under which the [Employer] agreed to be bound by the provisions of the contract between the Association and the Union. For the next 20 years the [Employer] executed and

adhered to the successive Association-Union collective-bargaining agreements. The [Employer] did so as a separate entity and not by virtue of any membership in the multiemployer group.

In June 1980 the [Employer] became a member of the Association, and subsequently executed the 1982-1985 agreement with the Union. This contract had a 60-day notice of termination provision, an exclusive hiring hall provision, and a union-security clause. On 21 September 1983 the [Employer] timely resigned its membership in the Association. The Association has not opposed this resignation, but it considers the [Employer] bound to the terms of the 1982-1985 agreement. On the same date that it resigned from the Association, the [Employer] notified the Union that it was repudiating the contract and withdrawing recognition. The [Employer] was not engaged in any construction projects on 21 September 1983 on which it directly employed employees covered by the 1982-1985 labor agreement, and from that date until the 3 May 1984 date of the parties' stipulation the [Employer] has not directly employed any such employees.

By letter dated 27 September 1983, the Union objected to the [Employer's] repudiation of the agreement and withdrawal of recognition . . . .

The parties stipulated that from June 1960 until its September 1983 repudiation: the [Employer] relied exclusively on the Union's hiring hall for its ironworkers; all these employees were union members; they were hired on a jobsite-to-jobsite basis; and the [Employer] adhered to the terms of the applicable collective-bargaining agreement on all its projects. On many of these projects the [Employer] did not hire ironworkers directly, but used subcontractors who were signatory to the Union-Association agreement.

At all times material here, approximately 30 of the 35 members of the Association have, on a con-

> tinual and regular basis, been engaged in projects requiring the direct employment of employees covered by the Association-Union agreement. These employees have been members of the Union or have adopted the Union as their collective-bargaining representative. A majority of such employees moved from job to job and from employment by one member of the Association to another in response to work opportunities. Between 1 June 1982 and the date of the stipulation here, the [Employer] engaged in three projects on which it directly employed employees covered by the 1982-1985 agreement, the last of which was completed in April 1983. [Pet. App. 53a-56a.]

On these facts the Board found that

> the [Employer] violated Section 8(a)(5) and (1) by repudiating the 1982-1985 contract with the Union and withdrawing recognition during the contract's term. The [Employer] voluntarily entered into an 8(f) relationship with the Union and signed the contract. This contract was binding, enforceable, and not subject to unilateral repudiation by the [Employer]. Because the contract has expired, however, the Union enjoys no continuing presumption of majority status, and the [Employer] is not compelled to negotiate or adopt a successor agreement based solely on the existence of an 8(f) relationship. In addition, the Union is not entitled to engage in any coercive conduct, including strikes and picketing, to force the [Employer] to execute a successor 8(f) agreement. [Pet. App. 96a.]

These findings were predicated on the Board's decision to abandon its then-current approach to § 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(f)—the provision which permits employers and unions in the construction industry to enter into collective bargaining agreements even though the union's majority status is not established prior to doing so—and to instead "apply the following principles in § 8(f) cases":

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. [Pet. App. 58a-59a.]

On cross petitions for review filed by the Employer and the Union, and the NLRB's petition for enforcement, the Court of Appeals affirmed the Board in all respects.

ARGUMENT

The Employer's *certiorari* petition challenges the National Labor Relations Board's ruling, endorsed by the Court of Appeals, that "a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3)". (Pet. App. 58a-59a.)

It is true, of course, that the construction industry is important in the economy and that § 8(f) collective bargaining agreements are important in that industry's labor relations. It is equally plain that the legal status and effect of § 8(f) agreements has been a contentious issue; the instant case maps out the Board's third attempt to formulate a coherent approach to resolving that issue. Compare *Oilfield Maintenance Co.*, 142 NLRB 1384 (1963), and *Bricklayers Local 3*, 162 NLRB 476 (1966), with *R.J. Smith*, 191 NLRB 693 (1971), *enf. denied*, 480 F.2d 1186 (D.C. Cir. 1973), and *Ruttman Construction Co.*, 191 NLRB 701 (1971), and with Pet. App. 58a-65a. See also *NLRB v. Iron Workers*, 434 U.S. 355 (1978) (*Higdon Construction Co.*) and *Jim McNeff Inc. v. Todd*, 461 U.S. 260 (1983).

But given the limitations of its docket, this Court does not sit to decide every federal legal question that arises in such a context. As the Employer implicitly recognizes (Pet. 6-11), except in the most extraordinary situations, to make a case certworthy the decision below must throw the governing law into some disarray—by reason of its inconsistency with this Court's decisions or the decisions of other Courts of Appeals—and, failing that, the decision below must be palpably wrong. The petition here fails to make any such showing.

The portion of the decision below challenged by the Employer is *not* in conflict with this Court's decisions; the decision below is the *first and only* Court of Appeals' decision to consider the Board's present approach to § 8(f) and thus is plainly not in conflict with that of any other Court of Appeals; and the decision below is *entirely correct* in its recognition that repudiation of a § 8(f) agreement during its term constitutes an unlawful refusal to bargain. All that being so, there is no basis at this time for plenary review by this Court.

1. The Employer argues that this "Court has twice construed § 8(f) to permit unilateral repudiation of prehire agreements at any time prior to a union's attainment of majority status," (Pet. 6), and that the Court "has definitely interpreted § 8(f) to require that prehire agreements be voidable" (Pet. 8). That argument is patently wrong.

As the court below emphasized, this Court in the *Higdon* case went no further than to accept the then-current *Board* view that repudiation of a § 8(f) agreement is not an unfair labor practice on the ground that

> We have concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the pur-

poses of the relevant statutory provisions. [434 U.S. at 341.] [2]

It is difficult to conceive of clearer statements that the statutory materials regarding the voidability of § 8(f) agreements admit, not of one reading, but of several possible reasonable readings any one of which, if adopted by the agency, is equally entitled to judicial approval. Compare *Chevron U.S.A. v. National Res. Def. Council*, 467 U.S. 837, 843 (1984) (where there is "a legislative delegation to an agency on a particular question . . . a court may not substitute its own construction of a statutory provision for [the agency's] reasonable interpretation . . . .").

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[2] The *Higdon* Court added

> The Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957); *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960). [434 U.S. at 350.]

And the *Higdon* Court rejected the argument that the Board ruling there "was inconsistent with a prior decision" and "deserved[d] little or no deference," 434 U.S. at 350, on the ground that

> "[i]f *Oilfield Maintenance* [the earlier Board decision] represents a view that the majority status of the union executing a prehire agreement may not be challenged in unfair labor practice proceedings, the Board has plainly not adhered to that approach. Its contrary view has been expressed on more than one occasion. An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes. [434 U.S. at 351.]

The *McNeff case*—which, in contrast to *Higdon*, did not present any question concerning when an employer may legally repudiate a § 8(f) agreement—is instinct with the same understanding. In *McNeff* the Court

> granted certiorari to resolve conflicts in the Circuits as to whether monetary obligations that have accrued under a prehire contract authorized by 8(f) . . . can be enforced, prior to the repudiation of such a contract, in a suit brought by a union against an employer under § 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. § 185, absent proof that the union represented a majority of the employees. [461 U.S. at 262.]

That was the *sole* question presented and the *McNeff* Court explained that the question was not controlled by *Higdon*:

> There is a critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract. Only the former obligation was treated in *Higdon*. [461 U.S. at 267.]

In the course of addressing the issue of contract law before it, the *McNeff* Court reviewed the *Higdon* decision. The *McNeff* Court explained that *Higdon* "approved the *Board's* conclusion that a prehire agreement is voidable 'until and unless [the union] attains majority support in the relevant unit,'" 461 U.S. at 269 (emphasis added), and the Court outlined the considerations that the *Board* had articulated, and on which the *Higdon* Court had relied, to justify that conclusion, 461 U.S. at 268-69.[3] The *McNeff* Court went on to explain that the "concerns . . . that led to our decision in *Higdon* are not

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[3] *See also McNeff*, 461 U.S. at 266 ("In *Higdon* we affirmed the Board's view that a prehire agreement does not make a union the 'representative of [an employer's] employees . . .").

present in this case," 461 U.S. at 269, and that "allowing a minority union to enforce overdue obligations accrued under a prehire agreement prior to its repudiation vindicates the policies Congress intended to implement in § 8(f)," *id.* at 271.

The very most that can be said about *McNeff*, insofar as that decision is relevant to the issue raised here, is that the *McNeff* Court in a *dictum* indicated that in the § 301 context the Court would follow the then-current Board law and allow an employer to "repudiate a prehire agreement before the union attains majority support in the relevant unit." 461 U.S. at 270. *McNeff* does not so hold, however, because that issue was not raised in the case. And *McNeff* assuredly does *not* hold that the Board is precluded from treating such a repudiation as a refusal to bargain; the permissible range of NLRB discretion under § 8(f)—and the scope of an employer's duty to bargain—simply were *not* at issue in *McNeff*.

2. The Employer's argument that the § 8(f) law in the lower courts is "confused" (Pet. 8) and shows "uncertainty over the proper interpretation of Section 8(f)" (Pet. 9) is even wider of the mark.

Given the fact that prior to the instant case, the Board, with this Court's approval, had taken the view that § 8(f) agreements are voidable, it is hardly surprising that "[p]rior to the Third Circuit's decision in the instant case, every post-*Higdon* Federal Court decision to consider the issue concluded that pre-hire agreements were voidable until the union obtained majority status" (Pet. 8).

Aside from this case, *Mesa Verde Construction Co. v. Northern California Dist. Council of Laborers*, 820 F.2d 1006 (9th Cir. 1987), *reh'g granted, prior opinion withdrawn*, 832 F.2d 1164 (9th Cir. 1987) (argued March 16, 1988) is the *only* other post-*Deklewa* Court of Appeals

case to date. While the now withdrawn panel opinion there is tentative—and provisional at most—that opinion's approach is in line with the approach of the decision below:

> Were the law of this circuit a blank slate, we would defer to the NLRB's *Deklewa* decision if it presented a reasonable interpretation and application of the National Labor Relations Act. . . . However, the *Deklewa* decision stands in conflict with prior [pre-*Deklewa*] decisions of this court . . . [and] we are not permitted to overrule prior panels' interpretations of the Act, even with intervening NLRB case law. The unions' argument under *Deklewa* should be addressed to the full court in a petition for rehearing en banc. [820 F.2d at 1013.] [4]

Against that background, it is more likely than not that the Ninth Circuit, which is now considering the question presented here *en banc*, will come to the same conclusion on the voidability of § 8(f) agreements as the Board and the court below.

3. The Employer's final point—that the Board's ruling that repudiation of a § 8(f) agreement constitutes an unlawful refusal to bargain "is inconsistent with the statutory scheme" (Pet. 9-10)—is of even less substance than those already discussed.

First, under the plain terms of § 8(a)(5) of the Act, an employer has a duty to bargain with a union holding the status of "exclusive representative under § 9(a)" and it is well-settled that this duty encompasses an employer

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[4] Circuit Judge Noonan, concurring, added

> The Board's interpretation is a reasonable interpretation and application of the National Labor Relations Act and is therefore entitled to deference. . . . The Board applied its new rules retroactively, and there is no reason that we should not follow this retroactive application. However, *Deklewa* is contrary to previous circuit law. The circuit should take the opportunity now to correct this law *en banc* in accordance with *Deklewa*. [820 F.2d at 1013.]

obligation to abide by an agreement reached with a § 9(a) representative. And, as the Board properly concluded here, the text of § 8(f) shows that Congress intended prehire agreements to confer § 9(a) status on the union signatory:

> [T]he proviso [to § 8(f)] explicitly makes Section 9 applicable by stating that 8(f) agreements cannot act as a bar to petitions aimed at, *inter alia*, decertifying or changing the employees' collective-bargaining representative. To us, it is reasonable to conclude that the applicability of Section 9(c) . . . requires the applicability of Section 9(a). Phrased otherwise, if a contract authorized by Section 8(f), complete with a union-security clause and exclusive referral provision, does not carry with it any indicia of 9(a) status, there is absolutely no need to make applicable the procedures for decertification of the signatory union. [Pet. App. 90a.]

Second, as the Board also concluded, "[i]f the legislative history [of § 8(f)] . . . indicate[s] anything, it is an intent by Congress to legitimate and make enforceable the array of construction industry bargaining . . . and employment practices that the Board had previously found to be unlawful, and thus unenforceable under the Act." (Pet. App. 70a.) One of the principal justifications that was offered for § 8(f) was that its enactment would enable employers in making bids for construction projects (and workers in selecting jobs) to rely on pre-hire agreements. (See Pet. App. 66a.) Such reliance necessarily presupposes that the pre-hire agreement is binding and enforceable Thus, in the most basic sense, the very point of § 8(f) is to make pre-hire agreements enforceable.

Third, as the Board stated, "a right of unilateral repudiation [of § 8(f) agreements] . . . is antithetical to traditional principles of collective bargaining under the Act," and is "not conducive to labor relations stability." (Pet. App. 75a-76a.) And there is not one iota of evi-

dence in the voluminous legislative record respecting § 8 (f) suggesting that Congress intended pre-hire agreements to be permissible but not legally enforceable. As the Board itself has now come to realize, if Congress had nonetheless intended to enact a wholly extraordinary provision—one that runs against the grain not only of the NLRA but of the entire corpus of contract law by transforming a lawful agreement *for a term* into an agreement *at-will*—"Congress would have expressly [so] stated." (Pet. App. 70a-71a.)

Fourth, and finally, a "rule granting unilateral repudiation rights to an employer who voluntarily enters into a collective bargaining agreement is not a necessary predicate for advancement of the employee free choice principle" (Pet. App. 74a), because

> an employer's decision to repudiate may be based on the employer's own economic considerations, without reference to our concern for the employees' desire to continue the status quo. Even if the employer has a legitimate question as to its employees' representational desires, Congress has expressly provided an electoral mechanism for testing them. [Pet. App. 74a.] [5]

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[5] In reaching this latter conclusion, the Board concluded, quite correctly, that the "pivotal argument in *R.J. Smith*"—the argument which led the Board there to hold that § 8(f) agreements may be repudiated unilaterally—"is simply wrong". (Pet. App. 74a.) In *R.J. Smith* the Board had reasoned that because, under the proviso to § 8(f), pre-hire agreements cannot bar a representation election to determine whether the signatory union enjoys majority support, "it would be anomalous, indeed, to hold that Section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges." 191 NLRB at 694. But as the Board here observed, "[t]here is . . . a significant distinction between permitting such an inquiry [into the union's majority support] through the Board's representational process—the mechanism expressly mentioned in the proviso—and permitting unilateral anticipatory repudiation of a collective-bargaining agreement." (Pet. App. at 70a.) Thus it is not the least bit anomalous to allow employees (or employers) to secure a representation election to test employee sentiment but

The Board thus properly concluded that Congress intended § 8(f) agreements to be enforceable during their term.[6]

CONCLUSION

For the above-stated reasons, the petition for certiorari should be denied.

Respectfully submitted,

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not to allow an employer to unilaterally repudiate his § 8(f) agreement. To the contrary, what is

> anomalous [is] to hold, as in *R.J. Smith*, that a proviso enacted to preserve employees' rights to choose, change or reject their own collective-bargaining representative can serve as a basis for an employer unilaterally to repudiate a voluntary collective-bargaining agreement for any reason it chooses. [Pet. App. 74a.]

[6] The *certiorari* petition also raises a "retroactivity" question. (Pet. i). The Employer's one paragraph discussion of that (Pet. 11) does nothing to answer—much less to refute—the Court of Appeals' careful demonstration that on retroactivity the Board recognized "all interests of all parties," that "even under the *R.J. Smith* rule it appears entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the Union," that the Board's decision does "nothing more than hold Deklewa and the Union to the terms and conditions of the § 8(f) contract into which they voluntarily entered" and that there is "no manifest injustice in that decision". (Pet. App. 40a-44a.) We therefore rest on the Court of Appeals' reasoning in urging that the *certiorari* petition be denied in this regard as well.